IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06/09/2007

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THE HON'BLE MR.JUSTICE M.JAICHANDREN

Writ Petition No.28733 of 2007
and
M.P. No.1 of 2007

Tvl.Viking Warehousing
No.5
G.N.T. Road
Moolakadai
Chennai 600 110
Rep. by its Partner Mr.Yagnesh R.Thakkar ..Petitioner.

Versus

The Commercial Tax Officer
Manali Assessment Circle
Kuralagam Annexure
First Floor
Chennai 600 018. ..Respondent.

Prayer:

Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorari to call for the records of the respondent, dated 29.06.2007, in CST No.819523/2003-2004 and quash the same so far it relates to levy of penalty of Rs.75600/- under Section 12(3)(b) of the TNGST Act.

For petitioner : Mr.N.Muralikumaran for Mc.Gan Law Firm

For respondent : Mr.R.Mahadevan, Additional Government Pleader

O R D E R

Mr.R.Mahadevan, learned Additional Government Pleader, takes notice for the respondent.

2. With the consent of the learned counsels appearing on either side, the writ petition is taken up for final disposal.

3. It is submitted that the petitioner concern is an assessee on the file of the respondent both under the Tamil Nadu General Sales Tax Act, 1959, (in Short `the Act') and the Central Sales Tax Act, 1956. For the assessment year 2003-2004, the respondent had passed an assessment order, on 10.04.2005, accepting the total taxable turnover reported by the petitioner concern and based on the books of accounts submitted on its behalf. However, the respondent by its proceedings, dated 14.03.2007, in CST.No.819523/2003-2004, had issued a pre-revisional assessment notice holding that the petitioner had leased out the cranes and collected the lease charges for which it had to pay sales tax. It has been further submitted that the petitioner was under the bonafide impression that collection of lease charges by leasing out cranes would not fall under the ambit and scope of the sales tax laws and therefore, it did not pay any tax on the same. When it was pointed out that the petitioner was liable to pay sales tax on the amount collected as lease charges, it had paid the entire amount of Rs.60,480/- at 12.6%. Only

thereafter, the revisional assessment notice had been issued proposing to revise the turnover of the petitioner concern. A revisional assessment order had been passed on 29.06.2007 revising the turnover of the petitioner. While revising the turnover of the petitioner, the respondent had also levied penalty, under Section 12(3)(b) of the Act. Therefore, the petitioner had been constrained to file the present writ petition, under Article 226 of the Constitution of India, challenging the impugned order of the respondent, dated 29.06.2007, made in CST.No.819523/2003-04, stating that the said order cannot be sustained in the eye of law.

4. It has been submitted on behalf of the petitioner that once the tax had been paid, even before the issuance of the show cause notice, the respondent does not possess the power to levy the penalty. In case of escaped assessment of tax, the respondent does not possess the power to levy penalty, unless it is shown that the non-payment of tax is due to wilful non-disclosure of the assessable turnover by the dealer. Unless, the respondent could show that the assessee had wilfully avoided disclosure of the assessable turnover or avoided the submission of the returns or the payment of tax, the question of levying of penalty does not arise.

5. The learned counsel appearing for the petitioner had

relied on a decision of the Division Bench of this Court made in State of Tamil Nadu Vs. Mahalakshmi Textile Mills Limited (1996 100 STC 269), wherein the Division Bench by following the decision rendered in State of Tamil Nadu Vs. Lucky Rasi Radio House (1996 100 STC 210 (Mad.), had held that where the defects in the original returns were rectified by the dealer by filing a revised statement and the tax due thereunder had been paid before the completion of the assessment, it could not be said that the original return was defective so as to attract penalty, under Section 12(5) of the Tamil Nadu General Sales Tax Act, 1959.

6. The learned counsel appearing for the petitioner had also relied on a decision of the Apex Court made in Dilip N.Shroff V. Joint Commissioner of Income Tax and another (2007 291 ITR 519(SC)), wherein the Supreme Court, while dealing with Section 55A and 271(1)(C) of the Income Tax Act, 1961, had held that imposition of penalty is not automatic. Levy of penalty is not only discretionary in nature but such discretion is required to be exercised on the part of the Assessing Officer keeping the relevant factors in mind. Some of those factors apart from being inherent in the nature of penalty proceedings, as has been noticed in some of the decisions of this court, inheres on the face of the statutory provisions. Penalty proceedings are not to be initiated, as has been noticed by the Wanchoo

Committee, only to harass the assessee. The approach of the Assessing Officer in this behalf must be fair and objective. The Supreme Court had further held that for the levying of penalty the respondent ought to show that there was a deliberate act or omission on the part of the assessee. Such deliberate act must be either for the purpose of concealment of income or furnishing inaccurate particulars.

7. Mr.R.Mahadevan, the learned Additional Government Pleader, appearing on behalf of the respondent has not refuted the contentions raised on behalf of the petitioner.

8. In view of the submissions made by the learned counsel appearing for the petitioner and taking note of the decisions referred to in support of his contentions, the impugned order of the respondent, dated 29.06.2007, made in CST.NO.819523/2003-04, is set aside in so far as it relates to the levying of penalty of Rs.75,600/- on the petitioner, under Section 12(3) of the Tamil Nadu General Sales Tax Act, 1959.

Accordingly, the writ petition is allowed. No costs. Consequently, connected M.P.No.1 of 2007 is closed.

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To

The Commercial Tax Officer
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